

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ILLINOIS

In Re	)	
	)	In Bankruptcy
RALPH E. FERGUSON, JR.	)	
EMMA M. FERGUSON	)	No. 93-50923
	)	
Debtors.	)	
	)	
	)	
RICHARD BALLEW	)	
PAULA BALLEW,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adversary No. 94-5012
	)	
RALPH FERGUSON	)	
Individually and d/b/a	)	
FERGUSON CONSTRUCTION CO.,	)	
	)	
Defendant.	)	

O P I N I O N

Before the Court is the complaint of Plaintiffs contesting the dischargeability of a judgment debt entered in their favor and against Ralph Ferguson, d/b/a Ferguson Construction Co., in the Circuit Court of Madison County, Illinois.

On July 9, 1988, Plaintiffs and Mr. Ferguson entered into a written contract wherein Mr. Ferguson agreed to build a second story addition onto Plaintiffs' house. Mr. Ferguson agreed to perform the construction work and supply the necessary materials in exchange for the sum of \$28,000.00. One-third of that amount was due upon execution of the contract, one-third was payable when construction was half completed, and the final third was due upon completion of the project.

Plaintiffs paid the first installment, and Mr. Ferguson began the project; but before the project was half completed, Mr. Ferguson ran out

of funds with which to purchase materials, and went to the Plaintiffs asking for an advance. Plaintiffs paid additional funds to Mr. Ferguson, who resumed work on the project; however, before the project was complete, Mr. Ferguson again ran out of money to purchase materials, and again approached the Plaintiffs, asking to be paid the final installment in advance. Having already paid \$23,000.00, Plaintiffs refused this second request.

Mr. Ferguson testified that he had a number of other projects ongoing at the time, and that his intention was to go to work on the other projects, hoping to make a profit at some or all of them, which would allow him to purchase the materials necessary to complete the project for the Plaintiffs. That never happened. Mr. Ferguson never completed the construction work for Plaintiffs and never told Plaintiffs that he would be unable to complete the project.

Plaintiffs filed suit against Mr. Ferguson in the Circuit Court of Madison County, Illinois, based upon breach of contract. Mr. Ferguson was not represented by counsel in the state court proceedings, and a judgment against Mr. Ferguson was entered in favor of Plaintiffs in the sum of \$27,354.71 plus interest.

Mr. Ferguson and his wife subsequently filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Plaintiffs filed a complaint contesting the dischargeability of the state court judgment in their favor under § 523 of the Bankruptcy Code.

To establish nondischargeability of a debt under 11 U.S.C. § 523(a)(2)(A), a creditor must prove:

1. that the debtor made a materially false representation,
2. that the debtor knew the representation was false when he or she made it, or made the representation with such reckless disregard for the truth as to constitute willful

misrepresentation,

3. that the debtor made the false representation with the intention and purpose of deceiving the creditor,
4. that the creditor reasonably relied on the false representation, and
5. that the creditor sustained damages as a proximate result of reliance on the false representation.

In re Scarlata, 979 F.2d 521, 525 (7th Cir. 1992); In re Kimzey, 761 F.2d 421, 423 (7th Cir. 1985). The creditor must establish each element by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279 (1991)

The creditor must establish actual or positive fraud involving moral turpitude or intentional wrongdoing. In re Guy, 101 B.R. 961, 978 (Bankr. N.D. Ind. 1988). A breach of a contract or a failure to perform some promised act, by itself, will not render a debt nondischargeable under § 523(a)(2)(A), although entering into a contract or promising an act with no intention of performance may support a finding of nondischargeability. In re Faulk, 69 B.R. 743, 750 (Bankr. N.D. Ind. 1986).

Based upon the evidence and testimony presented at trial, the Court is unable to conclude that any statements made by Mr. Ferguson were in violation of § 523(a)(2)(A). While execution of the July 9, 1988, contract constituted a representation of a present intent to complete the building project, there is no evidence before the Court which would allow it to conclude that Mr. Ferguson knew or should have known on July 9, 1988, that he would not or could not complete the project, nor is there any evidence that Mr. Ferguson intended to deceive the Plaintiffs when the contract was executed. Mr. Ferguson had been in the construction business for over ten years prior to July 9, 1988, and the evidence does not indicate that this contract was anything other than an ordinary

contract entered into as a part of the ongoing business of Mr. Ferguson. In fact, the evidence adduced at trial indicated that Mr. Ferguson expended a substantial amount of time and money working toward the completion of the Plaintiffs' project. He purchased materials, hired labor, and worked on the project for close to two months. Based upon these facts, the Court must conclude that Mr. Ferguson intended to perform under the contract when he executed it.

The testimony at trial established that Mr. Ferguson twice asked the Plaintiffs for cash advances, and that the first such request was granted and the second was denied. Plaintiffs did not offer any evidence that any factual representations were made by Mr. Ferguson to the Plaintiffs during the course of either of these conversations or at any other time. Mr. Ferguson's uncontroverted testimony was that he told the Plaintiffs that he would attempt to finish the job; in fact, he did attempt to finish the job. He explained that he had seriously underbid several projects and that he ran out of money, which prevented him from finishing a number of incomplete projects.

Plaintiffs point to a number of acts or omissions on Mr. Ferguson's part which they find objectionable and indicative of a fraudulent pattern of conduct:

- They claim that Mr. Ferguson moved numerous times, without advising them where he was going. Mr. Ferguson disputed that he ever attempted to conceal his whereabouts.
- Mr. Ferguson allegedly refused to accept Plaintiffs' phone calls after he ceased working on their construction project, although he disputed this contention as well.
- In 1994, Mr. Ferguson entered into a consent decree with the State of Illinois permanently enjoining him from conducting home improvement and/or repair services in the State of Illinois. Mr. Ferguson explained that, at that point in time, he was ready to retire from the construction business and that he was without funds to hire an attorney to represent him in the proceedings filed by the Attorney

General. The Judgment and Consent Decree entered in said proceedings indicate that Mr. Ferguson specifically denied any and all allegations of misconduct, and that he voluntarily entered into the Consent Decree to resolve disputed claims and to bring a prompt resolution to the controversy. Consent Decree at p. 4.

- Debtors' bankruptcy schedules show the judgment indebtedness owing to Plaintiffs as having been incurred in 1991, whereas the state court judgment was entered in 1990.
- Debtors' matrix lists an incorrect address for Plaintiffs' counsel. Mr. Ferguson conceded this, but stated that he was unaware of how or why the mistake was made, having left the responsibility for preparing the matrix to his attorney.

The difficulty with Plaintiffs' case is that their factual assertions do not relate to any of the necessary elements which must be proven in order to find a violation of § 523(a)(2)(A). As indicated above, in order to prove a violation of § 523(a)(2)(A), Plaintiffs must prove by a preponderance of the evidence that, inter alia, Mr. Ferguson made a materially false statement which he knew or should have known was false when he made it. This they have failed to do. For the reasons set forth above, the relief prayed for in Plaintiffs' Objection to Discharge is denied. The judgment debt against Mr. Ferguson in favor of Plaintiffs is dischargeable in these proceedings.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

ENTERED: January 19, 1995

/s/ LARRY LESSEN  
UNITED STATES BANKRUPTCY JUDGE